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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 639

ARCHER ZAMLOCH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for
the Ninth Circuit
AND
BRIEF IN SUPPORT THEREOF.

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In the Supreme Court
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OCTOBER TERM, 1951

No.

ARCHER ZAMLOCH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Archer Zamloch for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit respectfully shows:

STATEMENT OF THE CASE AND THE MATTERS INVOLVED.

Petitioner, Archer Zamloch, together with Paul Steffen and Albert Benevedes[1] were charged by an indictment in two counts with the crime of conspiracy (18 U.S.C. 371) and the crime of bribery (18 U.S.C. 209).

The indictment (Vol. I, p. 4) contained a preamble to the effect that in April, 1949, one Marie Basom was indicted for a violation of 18 U.S.C., sec. 174, in that she did on or about April 15, 1949, fraudulently and knowingly conceal and facilitate the concealment of a derivative and preparation of morphine; that Marie Basom pleaded not guilty to said charge, was tried before a jury and testified as a witness in said cause; that the jury found her guilty and on July 15, 1949, the Court sentenced Marie Basom to serve 3 years and pay a fine:

The First Count of the indictment charged that the three named defendants did conspire and continue to conspire together with one Hugh Basom and with Marie Basom (named as co-conspirators but not as defendants) to commit offenses against the United States and to defraud the United States of its lawful powers in the due administration of justice by violating the following laws:

(a) Sec. 1622, Title 18 U.S.C., by procuring Marie Basom to testify falsely in her case in a material manner, to-wit: that she had received from a person other than Hugh Basom a key to a locker box in the Southern Pacific Depot, whereas in fact she received said key from Hugh Basom;

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[1]Steffen and Benevedes plead guilty to the charges and the trial proceeded against Zamloch alone. Neither Steffen nor Benevedes testified at petitioner's trial.

(b) Sec. 1503, Title 18 U.S.C., by corruptly endeavoring to influence and impede a witness, the said Marie Basom, from so testifying and from further testifying as a witness in her said case;

(c) Sec. 1503, Title 18 U.S.C., by endeavoring to influence, obstruct and impede the due administration of justice in that said defendants and co-conspirators knew that after the return of said verdict of guilty, the U. S. Attorney, his assistants and the Federal Bureau of Narcotics, did continue to investigate and attempt to prosecute offenses involved in said case to the end that an indictment be brought against those persons, other than Marie Basom, known to have owned, controlled and concealed the narcotics which were the subject of said case; that said defendants and conspirators by threat and force concealed the fact and suppressed the knowledge that defendants Paul Steffen and Albert Benevedes were principals with Marie Basom in the ownership, control and concealment of said narcotics;

(d) Sec. 209, Title 18 U.S.C., by directly and indirectly giving and offering to give $4,000 to Marie Basom with the agreement and understanding that her testimony be influenced in a material respect in said case for the purpose that she not disclose, reveal or testify that the said Hugh Basom, Paul Steffen and Albert Benevedes were principals in said case.

The foregoing was followed by 8 alleged overt acts.

The Second Count of the indictment charged that the defendants on or about June 22, 1949, did directly and indirectly offer to give and did give to Marie Basom

money and a promise and agreement therefor, upon an agreement and understanding that her testimony was in fact and should be influenced to the end that she, as a witness in her said case, should not disclose, reveal or testify that Hugh Basom and Paul Steffens and Albert Benevedes were principals in said case.

After a trial by jury appellant was convicted on both counts. After motion for a new trial had been denied, defendant was sentenced to 3 years imprisonment on the first count and to 2 years imprisonment on the second count, the sentences to run concurrently. From said judgment and sentences Archer Zamloch prosecuted his appeal.

The case as presented at the trial is properly summarized as follows:

Archer Zamloch was a member of the law firm of Hallinan, MacInnis and Zamloch, and represented Marie Basom at her trial.

Marie Basom (known as Marie Hames and under various other names) and Hugh Basom though unmarried were living together as husband and wife. (Vol. II, p. 828.)

Hugh Basom was a seaman and was away from the United States during Marie Basom's trial, though present in San Francisco prior to and at the time of her arrest.

Federal Narcotic Agents, through information imparted to them by an informer named "Klein", learned of the illegal traffic in narcotics of one Paul Steffens and Albert Benevedes and of having caused to be placed in a locker

box in a railway station at San Francisco a package containing narcotics and, on April 15, 1949, were waiting at the railway station for someone to come and get the package. (Vol. III, pp. 1192-1210.)

On April 15, 1949, Marie Basom was arrested just after she had opened the locker box and taken the package of narcotics therefrom. She was tried on June 20, 21 and 22, 1949 and found guilty. (Vol. I, p. 357.) A motion for probation having been made and denied, she was sentenced to imprisonment on July 15, 1949. On July 26, 1949, Marie Basom was transferred from the county jail to the Women's Reformatory at Alderson, West Virginia (Vol. I, p. 405) where she remained until June 17, 1950, when she was returned to the county jail at San Francisco in order to be a government witness at the trial of petitioner Zamloch. (Vol. I, p. 354.)[2]

Marie Basom, immediately following her arrest, told the arresting officers that she had received the key to the locker from a man whom she formerly knew named "Carl", who had requested her to go to the locker box and procure the package therefrom. (Testimony of Narcotic Agent McGuire, Vol. III, p. 1182; Testimony of Marie Basom, Vol. II, pp. 769-771.) At no time, until after her conviction and imprisonment, did she ever tell the public authorities that Paul Steffen, Albert Benevedes and Hugh Basom were involved in the narcotic transaction. At her trial Marie Basom told the same story as to

[2]These dates are important as the extra-judicial statements of the co-conspirator Benevedes, admitted over the objection of petitioner, were made many months after the trial and conviction of Marie Basom.

receiving the key from "Carl" as she had told the narcotic officers.[3]

Nowhere in the record (other than two hearsay conversations between Hugh Basom and Benevedes hereinafter described) is there any evidence that there were any dealings between Zamloch and Steffen, or Zamloch and Benevedes, or Zamloch and Hugh Basom, or between Steffen and Benevedes, or between Marie Basom and any of the other parties, relative to the payment or agreement to pay to Marie Basom any money to assure her silence as to the criminal participation of Benevedes, Steffen and Hugh Basom in the narcotic transaction. **Such alleged connection of Zamloch with any such agreement or activity was produced solely (1) by the erroneous admission of a wire recording of a conversation held between Hugh Basom and Benevedes nine months after the conviction of Marie Basom, and (2) the testimony of Hugh Basom as to a statement made to him by Benevedes, all of which was admitted over Zamloch's objection as being mere narrative of past events and not statements made in furtherance of the object of the conspiracy charged.**

MARIE BASOM, as a Government witness, testified in part as follows: When I first went to Zamloch I told him I had told the authorities that I received the key from an unidentified stranger by the name of "Carl". (Vol. II, p. 685.) On my second or third visit, Mr. Zamloch told me he knew Mr. Basom had given me the key. However,

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[3]The record of the trial is over 2000 pages in length. As the opinion of the lower Court does not state the facts of the case, we are compelled to make a more lengthy statement of the case in this petition than is customarily done.

that we would still stick to the same story I had told the officers and not change it when we went to trial. (Vol. II, p. 685.) After my conviction I said I wanted to see Mr. Karesh (Assistant U. S. Attorney) and tell the truth. Zamloch said he would see Karesh for me and on his next visit said he had seen Karesh and that as I was already convicted there wouldn't be any use to tell the truth at that late date. (Vol. II, pp. 695-6.)

The day before I left for Alderson Mr. Zamloch told me that he had $4000 for my being convicted. I don't remember just what his exact words were. He asked what I wanted to do with it. I didn't know what to do with it, so he said he would hold it for me for ten per cent and whenever I wanted it I should write for it. (Vol. II, pp. 702-3.) Zamloch never told me or wrote me where the $4000 came from. (Vol. III, p. 711.)

When I told the story to the arresting officers, that a man named "Carl" had given me the key to the locker, I knew it was a lie. My main idea was to prevent Mr. Basom from being arrested. At my trial I stayed with that story. (Vol. II, p. 774.)

HUGH E. BASOM testified for the Government in substance as follows: I am a member of the United States Merchant Marine. Recently I have been living with a narcotic agent. (Vol. II, p. 824.)

After Marie's arrest I called Benevedes and told him Marie had been arrested. (Vol. II, p. 851.) Benevedes told me to tell Marie to keep her mouth shut and for me to keep my mouth shut; that if we didn't we both would get knocked off. Benevedes told me Steffen had made arrangements for the bail and that the testimony and

everything would be taken care of by Steffen and himself. (Vol. II, pp. 854-5.) When Marie came home that night I told her what Benevedes had told me. She said the only thing we can do is stick to the story she had told the officers last night. (Vol. II, p. 855.)

Before I sailed out on May 12th or 13th I told Zamloch that I was the one who sent Marie to the locker and he said: "Yes, I knew that—Benevedes and Marie both told me that." (Vol. II, p. 867.)

When I again returned in August I went to Benevedes' apartment and saw Benevedes and his wife.[4] Benevedes said: "Did you know that girl wanted to call the prosecuting attorney, wanted to turn the whole bunch of us in?" I said I did not. Benevedes said that Zamloch had told him Marie wanted to go to the authorities and that he immediately got hold of Steffen and that they had gone to Steffen's office and made an agreement with Zamloch to pay him $500 to tell Marie to keep her mouth shut; that Zamloch had gone down and Marie had agreed to keep quiet for $4000. (Vol. II, p. 879.)

I went to Zamloch's office and told him I understood from Benevedes that he was holding $4000 for Marie and he said that was right. Zamloch said that you couldn't put the money in escrow because if you do the Federal authorities will investigate it and Marie will lose the money and go to jail. (Vol. II, pp. 881-2.)

I went back to sea and returned on November 8, 1949. I saw Zamloch and told him I had received a letter from

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[4]Zamloch objected to any conversation between Bason, Benevedes and his wife on the ground it called for a narrative of past events. The Court overruled the objection. (Vol. II, pp. 877-8.)

Marie asking me to get a receipt. Zamloch said he would show me the money which he did. It was in a safe deposit box. (Vol. II, p. 889.) I told Zamloch I was going to the authorities and he said if I did that both Marie and I would be murdered and get thrown in the Bay. (Vol. II, p. 893.)

In April of 1950, nine months after Marie Basom had been convicted, Hugh Basom, in an endeavor to get Marie released from prison, went to see George H. White, Chief of the Bureau of Narcotics in San Francisco, and told White the true story of the affair. White insisted that there be some corroboration to Hugh Basom's story and arrangements were made to put a microphone and wire recording apparatus in Basom's apartment, who was to hold a conversation with Benevedes for the purpose, as stated by White, that Basom "should have such a conversation with Benevedes, that the whole story of the case would be reviewed during this conversation from the lips of Benevedes". (Vol. III, pp. 1143-44.) Basom testified that it was the intention of Col. White and himself that by the recording of the conversation, Benevedes was to "give the full narrative of all that had taken place in the past". (Vol. II, pp. 960-1.) The conversation took place and was recorded.

The Government offered a transcript of the wire recording in evidence, which was objected to by Zamloch on the grounds that the same was not statements of an alleged co-conspirator made in furtherance of the conspiracy but was a mere narrative of past events. (Vol. III, p. 1094.) **The Court overruled the objection stating that if it was a narrative of past events that threw light on the**

conspiracy then continuing, it was relevant. (Vol. III, p. 1108.)

The recording will be found in the Record in Vol. III, pp. 1115-1142. This recorded conversation deals entirely with past events not elsewhere appearing in the evidence, and contains no act or statement that can be construed as an act or statement in furtherance of the conspiracy charged. It contains statements by Benevedes as to things said and done prior to the trial of Marie Basom by Zamloch, Steffen and himself. This wire recording has Benevedes as stating the details surrounding the payment of money to Zamloch to be paid to Marie Basom for her silence, compensation that was paid to Zamloch for his participation therein, etc.[5] The wire recording is full of filth and obscenity and was used by the Government in arguments to the jury as corroborative of the testimony of Hugh Basom; to produce before the jury the testimony of Albert Benevedes, who was not called as a witness; to produce before the jury the testimony of Paul Steffen, who was not called as a witness and to produce hearsay as to conversations alleged to have occurred between Zamloch and Steffen, etc. (Vol. V, pp. 1989, 1993, 2072, 2073 and 2079.)

The trial Court instructed the jury as to the use they could make of the wire recording of the conversation between Hugh Basom and Benevedes; viz: that if they found at the time the wire recording was made, Zamloch, Hugh Basom and Benevedes and others had entered into

[5]The full substance of the wire recording is set forth in the statement of the case contained in the brief filed in support of this petition, together with a summary of the matters contained therein of which there was no other evidence in record.

a conspiracy and that Benevedes and Zamloch were still in that conspiracy, then the statements in the wire recording were evidence against Zamloch (Vol. V, p. 2104), to which charge defendant took exception on the ground that the entire conversation was a mere narrative of past events and not statements in furtherance of any conspiracy. (Vol. V, p. 2117.)

On May 19, 1950 Paul Steffen who was then threatened or charged with violating the Harrison Narcotic Act and income tax evasion, went to see Richard Siegel, a tax lawyer who occupied offices in the building wherein was the law firm of Hallinan, MacInnis and Zamloch. He made arrangements with Siegel to represent him in his tax matters and through Siegel to be represented in any criminal cases by James Martin MacInnis. To insure fees to these two parties, Steffen executed a mortgage to MacInnis in the sum of $15,000 on real property he owned and a similar mortgage on the same property to Siegel in the sum of $10,000. At the trial the Government offered these mortgages in evidence on the ground that they showed the motive for Zamloch's entering into the conspiracy as charged, in that the motive was to procure a lucrative client in the person of Paul Steffen for the firm. (Vol. IV, p. 1537.)

Appellant had objected to the introduction of the mortgages on the ground they were hearsay; no foundation laid therefor and not binding upon the defendant Zamloch. The Court had twice refused to admit the mortgages in evidence but finally admitted the same. (Vol. IV, p. 1639. Both Zamloch (R. 1351-2) and MacInnis (R. 1938-41)

denied any knowledge of the mortgages, their purpose or execution until after the same had been recorded.

The mortgage to MacInnis was used against Zamloch with great prejudicial effect by the prosecutors in their arguments to the jury. (Vol. V, pp. 1977, 1991, 1994, 2062, 2080.)

ARCHER ZAMLOCH, testifying in his own behalf, testified that he never told Marie Basom to give false testimony; that neither before nor during her trial had Marie Basom revealed to him that she was about to tell a false story or that "Carl" was a mythical person, or that the story she had told the arresting officer was false; that at no time did he ever urge Marie Basom to tell a false story or to conceal the name of Hugh Basom or to conceal the fact that Benevedes and Steffen were involved in the narcotic transaction; that when he learned of the existence of Basom's connection with the case, he told her that with that knowledge she could obtain liberty or leniency by divulging his connection; that he never bribed Marie Basom to give false testimony or represented to her that he would give her money or that money would be sent her if she would give false testimony; that he never offered to give her money as a price for her silence concerning Basom, Steffen or Benevedes. (Vol. II, pp. 1214-15.) He further testified that prior to her trial Marie Basom never disclosed to him that she had obtained the key to the locker box from Hugh Basom and that he never told Marie that Hugh Basom was the person who had given her the key (Vol. III, p. 1255); that he never told her to stick to a story known

to be false (Vol. III, p. 1262); that after Marie Basom's conviction he didn't at any time tell her not to tell the truth to the probation officer (Vol. III, p. 1276);[6] that on July 15th, immediately after she was sentenced, Marie Basom told him that it was Hugh Basom who had given her the key; that she wouldn't inform on Hugh Basom because she loved him; that this was the first knowledge or information he received that Hugh Basom was the man who had given her the key and the first knowledge he had from any source as to the truth behind Marie Basom's arrest. (Vol. III, p. 1288.)

As to the money, Zamloch testified as follows: After her sentence on July 15th, Marie Basom told me she had $4500 on the outside and wanted me to get the money for her and if I called Benevedes he would know about it. (Vol. III, pp. 1286-7.) I asked her what the money was for and she told me I didn't have to know that; all I had to do was ask Benevedes for the money and to collect it. She gave me Benevedes' phone number. On July 21st Benevedes came in and counted out $4500. He asked me what Marie had told me and I said she had told me nothing except that he had this money or knew who did have it. (Vol. III, p. 1290.) I had never met or heard of Paul Steffen in my life. I told Marie I had collected the money and was holding $900 in satisfaction of my fee. She asked if I would hold the money for her. I agreed

[6]Mathew Curran, Probation Officer, testified that not once during his investigation did Marie Basom ever tell him any other story except that "Carl" had given her the key (p. 797) and that at no time did she ever tell him that she wanted to see the judge or the narcotic agents or the U.S. Attorney, or that she wanted to tell them the truth. (p. 804.)

and said I would keep it and if she wanted the money she was to write to me for it at any time. (Vol. III, p. 1292.)

On March 28, 1950, having received a letter from Marie requesting that I send her the $3600, Hugh Basom and I went down to the bank. I got the money, purchased a cashier's check for $3600 in the name of Marie Hames (Marie Basom's true name) and sent the check with a letter on to Marie Basom at Alderson, West Virginia. (Vol. III, pp. 1311-14.)

When Marie Basom said Benevedes was holding $4500 for her, the possibility that Marie Basom had illegally obtained it in the past, did occur to me. I had nothing upon which to base such a suspicion except that the woman had been convicted of a crime years before indicated the possibility she had other illegal income. It was the merest of conjecture in my mind. I didn't probe into the question of the money. (Vol. IV, pp. 1585-88.) On November 15, 1949 Hugh Basom told me that this money was money which they, Benevedes and Steffen, were paying to Marie for taking his rap in the nature of an indemnification for the time she had to serve. (Vol. IV, p. 1595.)

After the verdict of guilty, petitioner prosecuted his appeal to the United States Court of Appeals for the Ninth Circuit, urging as grounds for reversal among other things, the errors committed by the trial Court in admitting in evidence the two conversations between Basom and Benevedes as set forth above, the admission of the mortgages in evidence and the Court's instruction

to the jury on the evidentiary value of the wire recorded conversation.

The Court of Appeals rendered an opinion (Vol. V, pp. 2168 to 2179) upholding the Government on all points in a decision that runs counter to all prior decisions of this the Supreme Court of the United States and prior decisions of Courts of Appeals from other circuits.

JURISDICTIONAL STATEMENT.

1. Jurisdiction of the Court.

The jurisdiction of this Court is invoked under Title 28 U.S.C. sec. 1254(1).

2. The decision and judgments of the Court of Appeals.

The decision and judgment of the Court of Appeals was rendered on January 14, 1952. (R. 2168, 2180.)

A petition for rehearing was denied on February 7, 1952. (R. 2181.)

3. Basis upon which it is contended the Supreme Court has jurisdiction and cases in support thereof.

The basis upon which it is contended that the Supreme Court has jurisdiction herein and the cases believed to support such jurisdiction are as follows:

(a) The opinion of the Court of Appeals upholds the admission in evidence against a defendant on trial of the hearsay statements and declarations of a co-conspirator, consisting of a narrative of past events relative to the alleged conspiracy not elsewhere appearing in the record

and implicating the defendant, in direct conflict with the decisions of this Court in the following cases, in which this Court exercised its jurisdiction to review the erroneous judgments:

Krulewitch v. United States, 336 U.S. 440, 93 L. Ed. 790;

Logan v. United States, 144 U.S. 263, 36 L. Ed. 429;

Glasser v. United States, 315 U.S. 60, 86 L. Ed. 680.

(b) The District Court misdirected the jury on a basic issue, to-wit: if the jury found a conspiracy to exist of which defendant was a member, that the jury could then consider as evidence against the defendant the hearsay statements of an alleged co-consiprator consisting of a narrative of past events and the Court of Appeals upheld such action. Where the trial Court has misdirected the jury on a basic issue, this Court will review such action in a certiorari proceeding as was done in *Bollenbach v. United States,* 326 U.S. 607, 90 L. Ed. 318.

(c) The opinion of the Court of Appeals to the effect that the hearsay narrative statements of a co-conspirator relating what had theretofore been done by the conspirators including defendant, are admissible against a defendant if there can be culled therefrom two statements that might be construed as being in furtherance of the conspiracy, is in direct conflict with decisions from other Circuits such as the cases of *Harrison v. United States* (6 Cir.), 200 Fed. 662, 674; *Huntington v. United States* (8 Cir.), 175 Fed. 950, 951; *England v. United States* (5 Cir.) 174 Fed. (2d) 466, 469. Under such circumstances this Court has jurisdiction on certiorari to review the action of Respondent Court. (*Department of*

Treasury v. Ingram-Richardson Mfg. Co., 313 U.S. 252, 85 L. Ed. 1313.)

(d) The opinion of the Court of Appeals is in conflict with applicable decisions rendered by the Court of Appeals in other Circuits (as will be amplified in the brief filed in support of this petition). Under such circumstances this Court has jurisdiction on certiorari to review the action of Respondent Court. (See, *Department of Treasury v. Ingram-Richardson Mfg. Co.*, 313 U.S. 252, 253, 85 L. Ed. 1313, 1315.

(e) The opinion of the Court of Appeals holds that it is not error affecting the substantial rights of a defendant, under Rule 53a of the Rules of Criminal Procedure, to admit hearsay statements of an alleged co-conspirator which are merely narrative of past events pertaining to the conspiracy and implicating defendant and of which past events there is no other evidence in the record. This holding is directly contrary to comparable decisions of this Court, such as *Krulewitch v. United States*, 336 U.S. 440, 444, 93 L. Ed. 790, 795; *Fiswick v. United States*, 329 U.S. 211, 218, 91 L. Ed. 196, 201.

(f) The opinion of the Court of Appeals lays down the rule that the doctrine of imputed knowledge applies to a defendant on trial in a criminal case, which rule is at variance with decisions from Courts of Appeal from other Circuits, such as the case of *United States v. Ward* (3 Cir.), 168 Fed. (2d) 226, 228. Under such circumstances this Court will review the case on certiorari. (See, *Department of Treasury v. Ingram-Richardson Mfg. Co., supra.*)

THE QUESTIONS PRESENTED.

The questions presented and raised by this petition are as follows:

1. Where a defendant is on trial for conspiring with others to procure a person who is charged with a criminal offense to testify falsely at her trial by concealing the participation of others in said offense and to give or offer to give to such person money upon an agreement that her testimony would be so influenced and that she would not thereafter disclose the participation of such other parties, can such conviction be sustained where the Court has erroneously admitted evidence as to hearsay narrative statements of an alleged co-conspirator as to past events relative to the conspiracy and implicating defendant on trial where there is no other evidence of such facts in the record?

2. Where a defendant is on trial for the crime of conspiracy, can the conviction be upheld where the Court erroneously instructs the jury that they may consider as evidence against the defendant hearsay statements of an alleged co-conspirator which are merely narrative of past events and not made in furtherance of the object of the conspiracy, where such hearsay narrative statements relate what had theretofore occurred during the course of the conspiracy and of which facts there is no other evidence in the record?

3. Where the trial Court erroneously admits against a defendant on trial the hearsay narrative statements of an alleged co-conspirator narrating what had theretofore been done in pursuance of the conspiracy and implicating the defendant on trial, there being no other evidence in

the record as to such facts, can the conviction be upheld under the Harmless Error Rule as announced in Rule 53a of the Rules of Criminal Procedure?

4. Can the conviction of a defendant on trial for conspiracy be upheld where resort has to be made to the civil doctrine of imputed negligence in order to establish a motive for such defendant entering the conspiracy, where the proof of such motive consists of acts of an alleged co-conspirator and a third party not in furtherance of the conspiracy and of which acts the defendant on trial had no knowledge?

5. Where on a trial for conspiracy a lengthy narrative statement of a co-conspirator made out of the presence of the defendant as to facts in furtherance of the conspiracy theretofore done by defendant and others, is admitted in evidence over objection and there is no other evidence in the record as to such past acts, can the admission of all such evidence be justified merely because there are two statements made in such narration that can be construed as being in furtherance of the conspiracy charged?

POINTS RELIED UPON FOR THE ISSUANCE OF THE WRIT OF CERTIORARI.

The writ of certiorari prayed for herein should issue for each and all of the following reasons:

1. The opinion of the Court of Appeals lays down a rule which extends the rules governing the trial of criminal conspiracy cases far beyond any limits heretofore reached in any decision. The opinion sanctions the

introduction in evidence of hearsay narrative statements of past events, alleged to have been made by a co-conspirator, narrating acts that had been done by alleged co-conspirators and the defendant on trial in pursuance of the conspiracy charged and as to which acts there is no other evidence in the record, if in such narrative statement the alleged co-conspirator expresses his intention of performing some act in the future or declares what an absent co-conspirator would do if certain contingencies arose. The rules of evidence relating to trials of conspiracy should not be extended beyond the limits now sanctioned by law and the decisions of this Court and such new rule should be abrogated. (See, *Krulewitch v. United States*, 336 U.S. 440, 93 L. Ed. 790.)

2. That each of the matters passed upon by the Court of Appeals, as set forth under Subdivision 3 of the Jurisdictional Statement herein, is an important question of general law and decided in a way not tenable and in conflict with the weight of authority and of comparable decisions of this Court.

3. The holding of the Court of Appeals that the hearsay statements and declarations of a co-conspirator, consisting of a narrative of past events in furtherance of a conspiracy and implicating the defendant, are admissible in evidence against a defendant is in direct conflict with applicable decisions of this Court, such as *Krulewitch v. United States*, 336 U.S. 440; *Logan v. United States*, 144 U.S. 263, and *Glasser v. United States*, 315 U.S. 60, and is in conflict with comparable decisions of other Courts of Appeals which are cited in the Brief attached hereto.

4. The opinion of the Court of Appeals that incompetent hearsay statements of a co-conspirator consisting of a narrative of past events done in furtherance of the conspiracy, not elsewhere appearing in the record, and implicating the defendant, are admissible against the defendant if in such statements can be found two statements that may be construed as statements in furtherance of the conspiracy, is erroneous and contrary to comparable decisions rendered by Appellate Courts in other Circuits.

5. The opinion of the Court of Appeals erroneously upholds a misdirection to the jury on a basic issue in the case. Under such circumstances the conviction based thereon cannot stand and should be annulled by this Court on certiorari. (*Bollenbach v. United States,* 326 U.S. 607.)

6. The opinion of the Court of Appeals holding, under Rule 53a of the Rules of Criminal Procedure, no error was committted affecting the substantial rights of the defendant in the admission of hearsay statements of an alleged co-conspirator which were merely narrative of past events implicating the defendant, and of which past events there was no other evidence in the record, is directly contrary to comparable decisions of this Court (*Krulewitch v. United States, supra; Fiswick v. United* 329 U.S. 211, 218, holding that the admission of such hearsay statements is not cured by the Harmless Error Rule). This Court should grant certiorari for the purpose of annulling the judgment.

7. The opinion of the Court of Appeals lays down the rule that the civil doctrine of imputed negligence is applicable to a defendant in a criminal case in its holding that knowledge of the execution of the mortgages from Steffen

to MacInnis and to Siegel could be imputed to defendant merely because MacInnis was a member of the law firm of which Zamloch was also a member and because Siegel had offices in the same building; such holding is contrary to decision from Courts of Appeals from other Circuits and should be reviewed by this Court.

Wherefore, petitioner respectfully submits that this Honorable Court issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, to the end that the questions involved may be fully presented and argued and justice done in the premises.

Dated, San Francisco, California,
March 5, 1952.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am a member of the bar of the Supreme Court of the United States and that I am counsel for the petitioner in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,
March 5, 1952.

LEO R. FRIEDMAN,
Attorney for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1951

No.

ARCHER ZAMLOCH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS AND JUDGMENTS OF THE COURTS BELOW.

The judgment of the trial Court was rendered and filed on August 29, 1950. (Vol. I, p. 93.)

The decision of the Court of Appeals was rendered and filed on January 4, 1952. (Vol. V, p. 2168.)

The judgment of the Court of Appeals was entered on January 14, 1952. (Vol. V, p. 2180.)

Petition for rehearing denied on February 7, 1952. (Vol. V, p. 2181.)

JURISDICTION.

The jurisdiction of this Court is invoked under Title 18 U.S.C., Section 1254.

The basis on which it is contended this Court has jurisdiction and cases in support thereof are fully set forth in the foregoing petition at page 15 thereof.

STATEMENT OF THE CASE.[7]

1. The indictment.

Archer Zamloch, together with Paul Steffen and Albert Benevedes, were charged in an indictment (Vol. I, p. 4) with the crime of conspiracy (18 U.S.C. 371) and the crime of bribery (18 U.S.C. 209).

Steffen and Benevedes plead guilty and petitioner was tried alone before a jury. Neither Steffen nor Benevedes was called as a witness at the trial.

The first count of the indictment contains a preamble to the effect that in April, 1949, Marie Basom was indicted for fraudulently and knowingly concealing, etc., a

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[7]The record of the trial is over 2000 pages in length. As the opinion of the lower Court does not state the facts of the case, we are compelled to make a more lengthy statement of the case in this brief than is customarily done.

derivative and preparation of morphine in violation of 18 U.S.C. 174; that she was tried and convicted. Then it alleges that **Zamloch, Steffen and Benevedes conspired together and with Hugh Basom and Marie Basom** (the latter two named as conspirators but not as defendants) to violate Sections 1622, 1503 and 209 of Title 18 U.S.C. by procuring Marie Basom to testify falsely in her case, to-wit: that she had reecived a key to a locker box in the Southern Pacific Depot from a person other than Hugh Basom, whereas she received said key from Hugh Basom; by corruptly endeavoring to influence and impede Marie Basom from so testifying and from further testifying in her said case; by endeavoring to obstruct, etc., the due administration of justice in that said defendants and co-conspirators knew that after the conviction of Marie Basom the public officials would continue to investigate offenses involved in said case so that an indictment against other persons than Marie Basom involved in said narcotic offense, by threat and force concealed the fact and knowledge that Paul Steffen and Albert Benevedes were principals with Marie Basom; by giving and offering to give to Marie Basom $4,000 upon the agreement that her testimony be so influenced that she not reveal, disclose or testify that Hugh Basom, Paul Steffen and Albert Benevedes were principals in said case.

The second count charged that defendants about June 22, 1949 did give and offer to give to Marie Basom money and the promise thereof on the agreement and understanding that her testimony was in fact and would be influenced as a witness in her case to the end that she

should not disclose, reveal or testify that Hugh Basom, Paul Steffen and Albert Benevedes were principals in said case.

2. The evidence relating to the trial and conviction of Marie Basom and Zamloch's connection therewith.

Federal Narcotic Agents through information imparted to them by an informer by the name of "Klein", learned of the illegal traffic in narcotics of one Paul Steffen and Albert Benevedes and of Steffen having caused to be placed in a locker box in the Southern Pacific Depot at San Francisco, a package containing narcotics. On April 15, 1945 the Narcotic Agents were waiting at the railway station for someone to come and get the package. (Vol. III, pp. 1192-1210.)

On April 15, 1949 Marie Basom, though unmarried to him, was living with Hugh Basom as husband and wife. (Vol. II, p. 828.) Steffen had given Hugh Basom the key to the locker box and told him to go and pick up the package. Hugh Basom told this to Marie (Vol. II, p. 842) and they agreed that Marie should pick up the package (Vol. II, p. 846). Marie Basom was arrested just after she had opened the locker box and taken the package of narcotics therefrom. She was tried on June 20, 21 and 22, 1949 and found guilty. (Vol. I, p. 357.) She was sentenced to imprisonment on July 15, 1949. On July 26, 1949 Marie Basom was transferred from the County Jail at San Francisco to the Women's Reformatory at Alderson, West Virginia (Vol. I, p. 405) where she remained until June 17, 1950 when she was returned to the County Jail

at San Francisco in order to be a Government witness at the trial of Archer Zamloch (Vol. I, p. 354).

Immediately following her arrest Marie Basom told the arresting officers that she had received the key to the locker box from a man, whom she formerly knew whose name was "Carl", who had requested her to go to the locker box and procure a package therefrom. (Testimony of McGuire, Vol. III, p. 1182; Testimony of Marie Basom, Vol. II, pp. 769-771.) At no time until after her conviction and imprisonment did she ever tell the public authorities that Paul Steffen, Albert Benevedes or Hugh Basom were involved in the narcotic transaction. At her trial Marie Basom told the same story as to receiving the key from "Carl" as she had told the narcotic officers.

The petitioner, Archer Zamloch, was a member of the law firm of Hallinan, MacInnis and Zamloch and personally represented Marie Basom at her trial.

Hugh Basom was a seaman in the Merchant Marine; was away from the United States during Marie Basom's trial, though present in San Francisco prior to and at the time of her arrest and on several occasions following her conviction.

Marie Basom testified that she made no arrangements for nor paid the premium for her bail (R. 680) and that she made no arrangements for employing Zamloch as her attorney (R. 682).

Marie Basom testified that when she first went to Zamloch she told him the story she had told the authorities about receiving the key from a person by the name of

"Carl" (R. 685); that on her second or third visit Zamloch told her he knew Basom had given her the key but that they would still stick to the story she had told the officers and not change it when they went to trial (R. 685); that the story she told at her trial about "Carl" was false (R. 690); that following the verdict in her case, she said she wanted to see Mr. Karesh (Assistant United States Attorney) and tell the truth; that Zamloch said he would see Karesh for her and later told her he had seen Karesh and that there was no use in telling the truth at that late date (R. 695-6); that when she told the story to the arresting officers and at her trial that a man named "Carl" had given her the key to the locker, she knew that such a story was a lie and that her main idea was to prevent Mr. Basom from being arrested (R. 774).

Hugh Basom testified that after Marie's arrest Benevedes told him to tell Marie to keep her mouth shut and for Basom to keep his mouth shut; that if they didn't they both would get knocked off (R. 854); that when Marie came home that night he told her what Benevedes had told him and Marie said the only thing they could do was stick to the story she had told the officers the night before (R. 855); that he sailed away on May 12th or 13th and before doing so he told Zamloch that he was the one who sent Marie to the locker and that Zamloch said: "Yes, I knew that—Benevedes and Marie both told me that" (R. 867).

Hugh Basom further testified that he again returned to San Francisco in August and went to Benevedes' apartment. (R. 877.) (When Hugh Basom was asked to

give the conversation between himself and Benevedes, petitioner objected that such conversation was a narrative of past events. (R. 877.) The Court overruled the objection on the grounds that the charge was one of a continuous conspiracy down to the date of the indictment and **"any acts or statements during that period from the inception of the conspiracy to that date are competent."** (R. 878).) Whereupon Hugh Basom gave the following testimony:

> "A. No, I did not. Benevedes jumped up and said, 'Now, you sit down. I've got something to tell you.' He said, 'Did you know that girl wanted to call the prosecuting attorney, wanted to turn the whole bunch of us in?
>
> I said, 'No, I did not.'
>
> He said, 'Well, she did. Zamloch came to me and told me, or called me—I don't know which it was—that she wanted to go to the authorities, and I immediately got hold of Steffen. We went to Steffen's office and made an agreement with Zamloch to pay him $500 to go down there and tell her to keep her mouth shut'. He said, Marie went down—or Zamloch went down and Marie agreed to keep quiet for $4,000.
>
> And he said, 'You have a letter waiting over in Mr. Zamloch's office explaining the whole deal from Marie.'" (R. 879.)[8]

ARCHER ZAMLOCH, testifying in his own behalf, categorically denied that he ever told Marie Basom to give false testimony; that neither before nor during her trial did Marie Basom tell him that she was about to tell a false story or that "Carl" was a mythical person, or that the

[8]There was no letter pertaining to the things Benevedes is alleged to have said. Benevedes described the letter in the record at p. 881.

story she had told the arresting officers was false (R. 1214); that on the contrary Marie Basom insisted such story was the truth (R. 1214). He further testified that at no time did he ever urge or encourage Marie to tell a false story or ever told her that she must stick to her story which she knew to be false or encourage her to conceal the name of Hugh Basom (R. 1214); that on the contrary when he learned of the existence of Basom's connection with the case, he told Marie that with that knowledge she could obtain liberty or at least leniency by divulging his connection; that he never urged or encouraged Marie Basom to conceal the identify or complicity of either Benevedes or Steffen; that he never bribed Marie Basom to give false testimony and never represented to her that he would give her money or that money would be sent her if she would give false testimony; that he never offered to give Marie Basom money as a price for her silence concerning Hugh Basom or the identity or complicity of Steffen or Benevedes (R. 1215); that he never asked or encouraged Marie Basom to refrain from making any disclosure to the authorities about any fact in the case (R. 1215).

ARCHER ZAMLOCH further testified that on July 15, immediately after Marie Basom was convicted, she then told him that it was Hugh Basom who gave her the key and that she couldn't inform upon him because she loved him; that this was the first time he had any knowledge that Hugh Basom was the man who had given her the key and it was the first knowledge he had from any source as to the truth behind the arrest of Marie Basom. (R. 1288.)

3. **Evidence relating to the payment of money to Marie Basom.**

MARIE BASOM testified that the day before she left for Alderson, West Virginia (July 2, 1945), that Zamloch came to see her and said that he had $4,000 for her; that she didn't know his exact words; that he said he had $4,000 for her being convicted and wanted to know what she wanted to do with it (R. 702); that Zamloch suggested she didn't give the money to Hugh Basom; that Zamloch said it was Benevedes' suggestion that she shouldn't give the money to Hugh Basom; that she didn't know what to do with it as she couldn't take $4,000 to Alderson with her and that Zamloch said he would hold the money for her for ten per cent and whenever she wanted it she should write for it (R. 703); that nobody owed her $4,000 (R. 717); that in March of 1950 she wrote to Mr. Zamloch for the money (R. 744); that Zamloch never told her or wrote to her where the $4,000 came from (R. 711).

HUGH BASOM testified that in August of 1949 he went to Zamloch's office and told Zamloch that he understood from Benevedes that Zamloch was holding $4,000 for Marie, and that Zamloch said that was right (R. 882); that he again returned to San Francisco in November, 1949 and saw Zamloch (R. 883-4); that he told Zamloch he had received a letter from Marie asking for a receipt (R. 884); that Zamloch took Hugh down to the bank and showed him the money (R. 891); the money was in the safe deposit and consisted of 36 $100 bills (R. 891), and that Zamloch wrote a receipt dated November 15, 1945 to the effect that he held on deposit for Marie Basom the sum of $3,600 (R. 897); that in March of 1950 he and Zamloch both went down to the bank and Zamloch

came out with a check made payable to Marie Hames (R. 909) (This was a cashier's check for $3,600 dated March 28, 1950 and was admitted as plaintiff's Exhibit No. 26 (R. 910)).

ARCHER ZAMLOCH in his own defense, testified in substance as follows:

After her sentence on July 15th, Marie Basom told me she had $4,500 on the outside and wanted me to get the money for her and if I called Benevedes he would know about it. (Vol. III, pp. 1286-7.) She said the money was hers and would be paid on demand and I could retain the balance of my fee from that. I asked her what the money was for and she told me I didn't have to know that; all I had to do was ask Benevedes for the money and to collect it. She gave me Benevedes' phone number. I telephoned Benevedes and conveyed to him the message Marie had given me. On July 21st Benevedes called me and said he had Marie's money and came in and counted out $4,500. He asked me what Marie had told me and I said she had told me nothing except that he had this money or knew who did have it. I told him I still had $900 coming on my fee and I was to take my fee out of the money. (Vol. III, pp. 1290-1.) I had never met or heard of Paul Steffen in my life. I told Marie I had collected the money and was holding $900 in satisfaction of my fee. She asked me if I would hold the money for her. I agreed and said if she wanted the money she was to write to me for it at any time. (Vol. III, p. 1292.)

On March 28, 1950, having received a letter from Marie requesting that I send her the $3,600, Hugh Basom and I went down to the bank. I got the money out of the safe

deposit box, purchased a cashier's check for $3,600 in the name of Marie Hames (Marie Basom's true name) and sent the check with a letter on to Marie Basom at Alderson, West Virginia. (Vol. III, pp. 1311-14.)

4. Evidence relating to the wire recording of a conversation between Hugh Basom and Benevedes and the trial Court's instruction thereon.

With the exception of the hearsay statement of Benevedes to Basom set forth above, there is no evidence in the record other than the wire recording, now to be set forth, as to any conversations or transactions between Zamloch and Steffen or Hugh Basom or Benevedes or Marie Basom, or with any two or more of them or between any two or more of them as to the payment of any money to Marie Basom prior to her trial and sentence for the purpose of her keeping silent, not telling the truth or for any other purpose whatsoever.

The Government succeeded in getting into evidence portions of a wire recording of a conversation between Hugh Basom and Albert Benevedes **on April 25, 1950, nine months after Marie Basom had started upon the service of her sentence at Alderson, West Virginia.** As a groundwork for the introduction of this recording, the Government called a member of the Federal Narcotics Bureau and Hugh Basom. The substance of their testimony is as follows:

COLONEL GEORGE H. WHITE, Chief of the Bureau of Narcotics in San Francisco, was called to the stand on five different occasions. The substance of his testimony is as follows:

I met Hugh Basom on April 19th of this year (1950) in company with his attorney, Bruce Werlhof. On April 25th I gave Mr. Basom instructions relating to a conversation he had with one, Albert Benevedes. Arrangements had been made for a microphone to be placed in Mr. Basom's apartment so that his voice and Mr. Benevedes' could be recorded. (Vol. II, pp. 548-9.) The instructions I gave Hugh Basom as to a conversation he was to have with Benevedes were that he arrange a reasonable story to account for the meeting with Benevedes; that "**he should have such a conversation with Benevedes, that the whole history of the case would be reviewed during this conversation from the lips of Benevedes.**" (Vol. III, pp. 1143-4.) Hugh Basom was cooperating with me. (Vol. II, p. 551.)

HUGH BASOM testified that Grady and Gross (Narcotic Agents) went with him to his apartment to set up the recording device; that he called Benevedes on the telephone the night before and made an appointment for Benevedes to call at his apartment the next day. (Vol. II, pp. 913, 915.) **By the recording to the conversation between myself and Benevedes I sought to find corroboration for what I had already disclosed to the agents. I wanted to get Benevedes to give the full narrative of all that had taken place in the past. I told Colonel White that was my purpose and intention and he told me that was his intention also.** (Vol. II, pp. 960-1.)

The Government then offered the wire recording in evidence. (R. 1093.) **Appellant objected to the introduction of the wire recording** on the ground that the same was not statements of an alleged co-conspirator made in

furtherance of the conspiracy but was a mere narrative of past events and therefore immaterial and incompetent. (Vol. II, p. 1094.) **The Court overruled the objection stating that if it was a narrative of past events that threw light on the conspiracy then continuing, that it was relevant.** (Vol. III, p. 1108.)[9] The edited portion of the transcript of the wire recording was then admitted in evidence and read to the jury. (Vol. III from pages 1115 to 1142.)

As the opinion does not set forth the matters discussed between Basom and Benevedes we here set forth a paraphrased summary of the wire recording, omitting the filth and vulgarity:

> Basom. A woman came here last night from the Reformatory in Alderson. Her name is Ann Tivoly. She is paroled. She got out last week and came here with a message from Marie that there is a lawyer here in town who guaranteed to get Marie out for $5000 and that if Marie doesn't get out on parole this May, she is going to spill everything she knows about both of us.[10]

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[9]Here a discussion took place as to whether the wire recording should be played or a transcript of the same used. The Court stated that the document was full of filth and obscenity and much of the wire recording transcription had nothing to do with the case; that it was going to allow the recording to go to the jury and asked appellant if there was any way, *without waiving his objection*, by which the recording could be cut down and shortened and given to the jury. As a result, counsel on both sides agreed that certain portions of the recording be eliminated and that the balance be read to the jury from the transcript of the recording made by Mr. Green. (Vol. III, pp. 1109 to 1115.)

[10]This statement was false and a fabrication made up by White and Basom for the purpose of getting Benevedes to talk. (Vol. III, p. 1143.)

Benevedes. It's all right with me; I can't get no $5000.

Basom. Do you suppose we can make arrangements to meet with Steffens?

Benevedes. I haven't seen Paul (Steffens) for about seven months.

Basom. She can involve both of us.

Benevedes. So what, let her go; she wanted to do that in the beginning when she got Paul; she told the prosecuting attorney that she was going to get Paul; if she wants to involve Paul now, that's all right.

Basom. How much did you tell Zamloch? How much did you tell her?

Benevedes. All I told Zamloch was he told me after she got convicted; he tells me, give me some light on this or I can't beat it. I figure the guy's hot, he lost the case. He said, what happened, so I told him what happened. I didn't tell too much. I told him that when she was going to cop out. So Zamloch looks up Paul and Paul told Zamloch that he didn't want to see these two guys get in trouble.

Basom. Is there any way I can talk to Steffens?

Benevedes. If she is going to cop out, let her go. Your word and my word is just as good as hers. They got no proof.

Basom. Well, I'm worried; I done right with that girl all the way through.

Benevedes. I was so mad when Zamloch called me up and you know Paul was hot at me then because I went down there and seen him.

Again Benevedes. If she comes and going to put the finger on you and me. All right, so they arrest you and me.

Basom. Can they do anything to Steffens; is there anything that can be done to him at all?

Benevedes. They're not hunting for us; they're not after you and me. If they get you and me, it's just like getting Marie, what's the difference? They're after Paul. I'm not going to cop out and I know you're not going to cop out. If she does squawk, she'll blow all the loot she got from Steffens. Paul will go right back to Zamloch, get the loot and get a good attorney for you and me.

Basom. How much did Steffens put up on this already?

Benevedes. He lost 9 pieces and he paid $4500.

Basom. This woman says that some woman from New York that's in there for the same thing, got a lot more than Marie did and she's given Marie the business.

Benevedes. Yes, but Marie's the one that made the agreement herself. She got $3600 out of it. She asked for $7500 so Zamloch called me up and told me he was going up to see her. It was Zamloch that said the $7500. Zamloch told me to go see Paul or whoever I wanted to see but first I told Gleama to go back home to her folks; that Marie was going to open up and I wanted to get snatched alone. So I went to see Paul and told him he had trouble and that Marie was fussed up because he never came up with nothing while she was beating the case.

Basom. That's what this woman here said; that while Marie was in jail down there, they didn't even give her a package of cigarettes.

Benevedes. I told Paul that in a way he was wrong, that the least he could do is come up with some dough and take care of the woman while she was in jail and Paul said that he didn't even know her but that he had given Rip (Basom) 250.

Basom. That was for the attorney.

Benevedes. Paul said, what does she want now, and I said that she was going to cop out if she didn't get $7500. I told Paul that I didn't have 75¢ and that if she wants to cop out on him, she can go right ahead and Paul said that I better go up and see him (Zamloch) again and tell him that's a little too much money but that we will make some kind of agreement to work out whatever way she wants to do her time, pay her wages and Paul said that he would have to go to the bank and make a Note for the dough. I told Paul that the last time you and I had come to see him we wanted $5000 and that if he had given us the 5000 he would probably have saved himself some money.

Basom. Yes, and I think we would have got her out of it too.

Benevedes. I find out after the case is over that Paul meant to do the right thing but he didn't want to give you or me the loot.

Basom. That's when I came off the first trip.

Benevedes. I put it to Paul: "What's the matter, don't you trust me; I had 10,000 of your money in my house and you won't trust me with 5000?" and Paul said: "Not in this case. It's a lot of money" and I said I had a hundred pieces of narcotics off of you, I could have blown and made myself 50 grand and I never did it, and Paul said: "I never sent her down there—I wouldn't send my wife down there to go pick it up. Why didn't he go pick it up?" and I said that I didn't know that—he probably figured it wasn't so suspicious if a woman went to pick it up. Steffens said if she cuts it down and goes for the wages, I intend to give her that.

Basom. Well, you took Paul over with you to Zamloch, didn't you?

Benevedes. As a matter of fact, he's the guy that handed Zamloch the money and he told Zamloch to go and find out and she settled for $4000. Steffens asked Zamloch how much money he wanted for his end to take care of this money for him and Zamloch made his price; he says 500 to go down and see Marie and take care of the money.

Benevedes. Well, if Marie talks, she talks, what's the difference?

Basom. Well, what am I going to do, I have no money?

Basom. I told this girl that we weren't foolish enough to put up 5000 to give somebody and not have Marie come out on parole, and this woman said the money could be put in escrow and if she doesn't come out, the money will not be touched.

Benevedes. Well, I want to see my attorney; I want to be all prepared for this. To tell you the real truth, if they pick me up they can't do nothing to me. If she says the narcotics belong to me, she's lying.

Basom. Well, the only thing Marie knows is that you told me to go down there; she knows that definitely.

Benevedes. If Marie comes out and fingers me cold turkey, I'm the guy that's stuck, that's all there is to it.

Benevedes. I think the guy that snitched on her is a goner. I think he's gone myself, nobody is talking. His wife tried to commit suicide.

Basom. I know you told me Paul was going to have a guy from Kansas City take care of him.

Benevedes. I think he's gone. Steffens never told me nothing.

Basom. Well, he will take care of Marie too, won't he?

Benevedes. No, that's definite.

Basom. She won't last a week.

Benevedes. Paul was hot over the other thing. He told me if I can't get her out, I won't give her 10,000; I'll give a couple of guys 5000 to go get her.

Benevedes. As far as getting in touch with Paul, I don't know where he is.

Basom. Well, it's just like Marie said. She says if they brought the guy with two men in the room, I couldn't point him out because I don't know him. She said she knew his name and that you sent me down there to pick up that package from him and put it in the locker. That's all she knows.

Benevedes. I'll just be in bad shape. I'll do my time and forget about the whole thing.

Basom. You think I'm going up there for that.

Benevedes. I'm telling you right now I'll make it a point to kill that son-of-a-bitch myself.

Basom. You're not the only one.

Benevedes. If she snitches, she can, I don't care. She agreed to accept it. She's really on the spot. She snatched the bribe already.

Basom. That's why I asked you how much you told Zamloch and how much he knew about this.

Benevedes. Zamloch is a good guy. He is an attorney and a hustler. If he wants to make some money, I don't care what he does. That's why Paul paid him the 500 so he wouldn't monkey with the 4000.

Benevedes. If she cops out and involves the people she got it from and makes a confession, she mentions my name. All right, she's got to involve Paul.

Basom. Well, he (Zamloch) took $900 out of her money; he wasn't innocent enough to take that out of the money she was supposed to be paid to do time for.

Benevedes. He wasn't supposed to touch that money because Paul paid him. He and Zamloch figured out that the most she'll get was two years. That's what Zamloch said.

Basom. How much did he give Zamloch, 2000?

Benevedes. He gave Zamloch 2000.

Basom. Did Zamloch tell you or did he tell Steffens that he wanted another 1000 if he won the case?

Benevedes. He told Paul that.

Benevedes. Paul had a kind of argument with Zamloch and said: "You worried about $1000 in escrow and you didn't even win the case." We were in Zamloch's office and Zamloch said that he didn't know who Steffens was but that if he did know who he was, there would have been 5000 in escrow and that's when Paul threw the money at him, the $4500.

Benevedes. Steffens came up fast with the $500 bail. He got her out on the street because I told him she could have fingered me right at the house and he said to go and see what Zamloch wanted. Zamloch wanted $3000 and I told Paul Zamloch wanted $3000 and he said to try and see if I could get him down; that he would rather give her the money than give it to him. That's what he told me then."

The trial Court instructed the jury as follows relative to the use of the recording:

"The Govenment further relies upon statements in what is known as the wire recording. Statements by co-conspirators are not allowable unless and until a jury finds that there was a conspiracy, and the parties who made the statements and the parties charged in the trial were in that conspiracy. In other words, if it is charged that A, B and C entered into a conspiracy and did certain things in violation of the law,

if A just comes out and says B and C were in it, that is not allowable and that is not evidence, until the jury is convinced by other evidence that A, B and C were in the conspiracy and had agreed to do these unlawful acts, and if the jury reached such a conclusion that A, B and C have entered into that conspiracy and were conspiring and confederating together and acting together to violate the law, then the statements made by A to B and C, or to either of the others, those declarations of what is known as the co-conspirator during the existence of the conspiracy, are good and valuable evidence against all of the conspirators that the jury has found were members of that conspiracy.

If the jury concludes that at the time of the wire recording in the apartment on Market Street, when Hugh Basom and Albert Benevedes met and had a conversation, which was recorded and excerpts of which had been read to you—if the jury concludes that Archer Zamloch and Hugh Basom and Benevedes and any others had entered into a conspiracy and that Benevedes and Zamloch, at that time, were still in that conspiracy and still agreeing and violating the laws of the United States, then those statements that Benevedes made are evidence against himself and against Zamloch, and are to be considered by this jury—if you believe them." (Vol. V, pp. 2104-5.)

Appellant took exception to the foregoing portion of the charge. (Vol. V, p. 2117.)

5. Evidence relating to the mortgages executed by Steffen to MacInnis and Siegel.

RICHARD M. SIEGEL, called by the Government, testified in substance that he was an attorney with offices

in the same building as those of Hallinan, MacInnis and Zamloch and that he did some work for such firm (R. 1800); that on May 19, 1950 Steffen came into his office and said he had been referred to him as an income tax lawyer; that Siegel knew he had been charged with violating the Harrison Narcotic Act and the income tax laws (R. 1801). There was a discussion about fees and Siegel said he was not a criminal lawyer and suggested that James Martin MacInnis could handle the criminal cases. (R. 1810.) Siegel said he didn't know what the fees would be in the matters and suggested that Steffen execute a mortgage to him for $10,000 to guarantee his fee which might later become due (R. 1811); that he also drew a mortgage from Steffen to MacInnis for $15,000 to cover any fees to be earned by MacInnis (R. 1813); that he never delivered the mortgage to MacInnis because by the time he saw MacInnis, Steffen had secured other counsel (R. 1813); that he never discussed the matter with MacInnis until the case had been taken over by other lawyers (R. 1818); that he had a Mr. Lipset immediately go to Riverside County and record the mortgages (R. 1822). A few days later Steffen came in for his file and said MacInnis didn't want the case and he wanted the whole case turned over to other lawyers named Ferriter and Purcell. (R. 1833.)

Both Archer Zamloch (R. 1351-2) and MacInnis (R. 1938-41) denied any knowledge of the mortgages, their purpose or execution until after the mortgages had been recorded.

Archer Zamloch testified that after Steffen and Benevedes had been arrested in May of 1950, they called upon

him and he told them his client was Marie Basom and he couldn't tell them anything about the case as what she had told him was confidential; that he didn't turn them over to MacInnis; that later MacInnis told him that Steffen had spoken to him about the case; that he told MacInnis about the facts, as he knew them, in the Marie Basom case, and that there would probably be a conflict of interests and that MacInnis could not represent Steffen (R. 1347-8); that he had no knowledge of any mortgage executed by Steffen to MacInnis (R. 1351); that he never saw the original of the mortgage nor any copy of it until shown the same at his trial (R. 1352).

At the conclusion of the Government's case in chief and before any of the foregoing testimony was given, the Government without any preliminary foundation, offered in evidence the mortgage executed by Steffen and his wife to MacInnis, to which offer appellant objected. (R. 1147-48.) The Court sustained the objection on the ground that it was not "willing to adopt the method either of communism or fascism of guilt by association". (R. 1148.) The next reference to the mortgage came during the cross-examination of Zamloch when he testified as above set forth. (R. 1347.) Whereupon the Government again offered the mortgage in evidence on the ground that it was executed for legal services rendered to Steffen and Benevedes. The Court denied the offer. (R. 1355.)

The Government then stated that the whole motive for the conspiracy charged was "to get a lucrative client like Mr. Paul Steffen who would come in and pay them $15,000". (R. 1537.) One hundred pages later when Mr. Zamloch was being cross-examined on an entirely different

matter, the Court, out of a clear sky, admitted the mortgage from Steffen to MacInnis. (R. 1639.) Later, and also during the cross-examination of Zamloch, the Government offered the mortgage from Steffen to Siegel in evidence and the Court admitted the same over objection of appellant. (R. 1685.)

Each of the mortgages was on property owned by Steffen located at Palm Springs, California, and are set forth in the record at pages 1641 and 1686.

SPECIFICATION OF ERRORS RELIED ON.

1. The opinion of the Court of Appeals is in error in upholding the admission in evidence of the wire recording of the conversation between Hugh Bascom and Albert Benevedes, as such conversation was one dealing solely with narratives of past events.

2. The opinion of the Court of Appeals is in error in upholding the admission in evidence of said wire recording, containing a narrative of past events, on the ground that such conversation contained two matters expressing the future intentions of two alleged co-conspirators.

3. The opinion of the Court of Appeals is in error in holding that a lengthy hearsay statement of a co-conspirator narrating many past events is admissible against a defendant on trial if it contains one or two statements that can be construed as in furtherance of the object of the conspiracy.

4. The opinion of the Court of Appeals is in error in holding that the trial judge's instruction to the jury as

to the evidentiary value of the wire recording was proper, and in holding proper that portion of the charge stating that upon proof of a conspiracy any hearsay statement of past events by a co-conspirator is evidence against a defendant on trial.

5. The opinion of the Court of Appeals is in error in holding that the testimony of Hugh Basom, as to a narrative of past events told to him by Benevedes, was properly admitted against the defendant.

6. The opinion of the Court of Appeals is in error in holding that the mortgages executed by Steffen to MacInnis and Siegel was properly admitted in evidence.

7. The opinion of the Court of Appeals is in error in its application of the Harmless Error Rule to the facts in the case at bar.

ARGUMENT.

I. THE COURT OF APPEALS WAS IN ERROR IN UPHOLDING THE ADMISSION IN EVIDENCE OF THE WIRE RECORDING OF THE CONVERSATION BETWEEN HUGH BASOM AND ALBERT BENEVEDES.

The Court admitted in evidence, over defendant's objection, a wire recording of a conversation between Hugh Basom and Benevedes on April 25, 1950. We have set forth above a complete summary of such wire recording and it will be found in the record from pp. 1115 to 1152.

Nowhere else in the record is there any evidence as to the following matters and things stated by Benevedes in the wire recording: That Steffen told Zamloch he didn't want to see Basom and Benevedes get into trouble; that

if Marie Basom talked, Steffen would go to Zamloch, get the loot and get a good attorney for Benevedes and Steffen; that Marie made the agreement herself and got $3600 out of it; that Marie had asked for $7500 and Zamloch called Benevedes up and told him he was going up to see Marie; that Zamloch said it was Marie who wanted the $7500; that Zamloch told Benevedes to go and see Paul; that Benevedes went to see Steffen and told him that Marie was excited because Steffen hadn't come up with anything while she was beating the case; that Benevedes told Steffen the least he could do was come up with some dough and take care of Marie while she was in jail; that Benevedes told Steffen Marie was going to "cop out" if she didn't get $7500 and Steffen said that Benevedes better see Zamloch again and tell him that was too much money but that they would make some kind of arrangement to work out whatever way she wanted to do her time; that Steffen told Benevedes if Marie cut down her price and went for the wages, he intended to give her that; that Benevedes took Steffen over to Zamloch and Steffen handed Zamloch the money; that Steffen told Zamloch to see Marie and that she settled for $4000; that Steffen asked Zamloch how much money he wanted for his end to take care of the money for him and Zamloch made his price at $500 to go down and see Marie and take care of the money; that Zamloch wasn't supposed to take anything out of Marie's money; that Benevedes said he thought the guy (Klein) who had snitched on Marie Basom was gone and that nobody was talking; that Paul had told Basom he was going to have a guy from Kansas City take care of Klein; that Steffen

told Benevedes that if he couldn't get Marie Basom out (prior to her trial) he would give a couple of guys 5000 to go get her; that Benevedes said he would make it a point to kill that s.o.b. himself; that Steffen would turn Marie Basom every way but loose because she had snatched the bribe already; that Steffen paid Zamloch the 500 so he wouldn't touch the 4000; that Zamloch wasn't supposed to touch the 4000 because Paul had paid him and that Zamloch took $900 of Marie Basom's money; that Steffen and Zamloch had figured out that Marie would do two years; that Steffen had paid Zamloch 2000 and Zamloch wanted another 1000; that Steffen threw the $4500 at Zamloch; that Steffen come up quickly with the $500 bail for Marie.

A mere reading of the wire recording demonstrates that it deals entirely with past events and the conversation was brought about by arrangements between the Chief Narcotic Agent and Hugh Basom in order that a complete history and narrative of all that had happened before would come from the mouth of Benevedes. (R. 961, 1144.)

The law relative to the admission of hearsay statements of a co-conspirator has been many times announced by this Court whose latest utterance will be found in *Krulewitch v. United States,* 336 U.S. 442, 443, 93 L. ed. 790, 794, as follows:

> "We cannot accept the Government's contention. There are many logical and practical reasons that could be advanced against a special evidentiary rule that permits out-of-court statements of one conspirator to be used against another. But however cogent

these reasons, it is firmly established that where made in furtherance of the objectives of a going conspiracy, such statements are admissible as exceptions to the hearsay rule. **This prerequisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be made in furtherance of the conspiracy charged, has been scrupulously observed by federal courts."**

The leading case on the subject is that of *Logan v. United States,* 144 U.S. 263, 309, 36 L. ed. 429, 445, where the Court states as follows:

"Doubtless in all cases of conspiracy, the act of one conspirator in the prosecution of the enterprise is considered the act of all, and is evidence against all. *United States v. Gooding,* 25 U.S. 12 Wheat. 460, 469, (6:693, 696). **But only those acts and declarations are admissible under this rule, which are done and made while the conspiracy is pending, and in furtherance of its object.** Even if, as suggested by the counsel for the United States, the conspiracy included an attempt to manufacture evidence to shield Logan, Johnson's subsequent declarations that Logan acted with the mob at the fight at Dry Creek were not in execution or furtherance of the conspiracy, **but were mere narrative of a past fact."**

See also, *Glasser v. United States,* 315 U.S. 60, 74, 86 L. ed. 680.

The lower Court, until its decision herein, had always adopted the rule that mere narrative of past events made by one co-conspirator out of the presence of the defendant on trial are inadmissible and that the admission of such evidence is error.

"There can be no question that the answers of the witness were most prejudicial and if they were not in furtherance of the object of the conspiracy, but merely narratives of past events—the husband telling his wife of the day's happenings—it was error to admit such evidence."

Mayola v. United States, (9 Cir.) 71 Fed. (2d) 65, 67;

Kuhn v. United States, (9 Cir.) 26 Fed. (2d) 463;

Dolan v. United States, (9 Cir.) 123 Fed. 52, 54.

"The test whether the statement or declaration of one conspirator is admissible against others does not depend entirely upon whether the statement was made during the existence of the conspiracy. **The statement or declaration must not only have been made during the continuance of the conspiracy,** but **it must likewise have been made in furtherance of its object.** This latter element was entirely overlooked by the Court below, * * *"

Tofanelli v. United States, (9 Cir.) 28 Fed. (2d) 581, 582.

In *Minner v. United States,* (10 Cir.) 57 Fed. (2d) 506, 511, the Court states:

"Counsel for Minner assert that the Court erred in permitting Armstrong to testify to what Norton told him about bribing Minner and manufacturing liquor in 1928. **This was a declaration of a past event, not in furtherance of the conspiracy charged, purely hearsay, not binding upon Minner, and should have been excluded.**"

Despite the fact that Benevedes did not know that Hugh Basom had become a Government Agent, it is manifest

that all he was doing was telling Basom, after the alleged conspiracy had terminated, what had occurred in the past.

The Court of Appeals gave the following reasons for upholding the admission of this evidence. (R. 2170-1.)

> "It was essential to the interests of the conspirators that Marie Basom remain silent at least until the statute of limitations ran. The reasons for preventing Marie Basom from talking were as strong and compelling at the time the conversation was had between Basom and Benevedes as it was the day it was entered into. In the course of the conversation Benevedes exhibited changing moods and attitudes in relation to the alleged threat conveyed to him by Hugh Basom of Marie Basom to talk. * * * At first, Benevedes used braggadocio; next, he pictured the extremes to which Steffen would go to dispose of an informer, relating that one informer was no longer around and, in direct terms, he, Benevedes, threatened that if Marie Basom, by carrying information to the officers, caused him to be imprisoned he would kill the s.o.b. himself. Rather a forceful way and one, which he no doubt considered an effective way, to cause Marie Basom to continue to remain silent. True, some of the recorded conversation was concerned with past acts but it seems such a result was inevitable because the conspirators would necessarily discuss the conspiracy in stating terms which would most probably insure its effective continuance."

There is nothing in the record to even indicate that there was any agreement that Marie Basom should remain silent at least until the statute of limitations ran. The only evidence in the case dealing with any silence on the part of Marie Basom is her statement that Zamloch

told her the money was for her being convicted and Zamloch's testimony that in November of 1949 Hugh Basom told him that they were paying the money to Marie for her taking the "rap" and as indemnification for the time she had to serve. The extent of the conspiracy established by the Government's case was merely that at her trial she should remain silent as to the truth. The conspiracy was terminated upon the conviction of Marie Basom. The result of the conspiracy may have thereafter continued but the conspiracy did not become a continuing one for years thereafter. (*Fiswick v. United States,* 329 U.S. 211, 216.) Thus, the statements made by Basom and Benevedes after the trial and conviction of Marie Basom were no longer made during the continuance of the conspiracy and, aside from being mere narrative of past events, were inadmissible as evidence against defendant. (*Fiswick v. United States, supra; Krulewitch v. United States, supra.*)

On p. 2172 the lower Court states "that the conversation contained statements in furtherance of the conspiracy had been determined by the Court; that function was thus withdrawn from the jury."

The trial Court never made any such determination; it admitted the wire recording solely on the ground that **"if it is a narrative of past events that throws light on a conspiracy, a conspiracy then in existence and continuing, then it is relevant."** (R. 1108.)

The opinion of the Appellate Court concedes that much of this evidence was narrative of past events, but states that such result was inevitable because the conspirators

would necessarily discuss the conspiracy in stating terms which would most probably insure its effective continuance. Merely discussing what would be the most effective means to carry forward a conspiracy cannot be construed as an act done to further the object of the conspiracy. In order for an act to be one in furtherance of a conspiracy, it must be as stated in *People v. Smith*, 151 Cal. 619, 626, 91 Pac. 511:

> "A declaration, statement, or act of a conspirator, to be admissible as in 'furtherance' of the conspiracy, must, as the word 'furtherance', *ex vi termini*, imports, be an act, statement, or declaration which in some measure, or to some extent, aids or assists towards the consummation of the object of the conspiracy."

Furthermore, mere talk between co-conspirators out of the presence of a defendant on trial, does not constitute competent evidence against such defendant.

In *United States v. Nardone*, (2 Cir.) 106 Fed. (2d) 41, 43, the rule is correctly stated as follows:

> "If this had been mere gossip between the two men, it would not have been admissible; the fact that one conspirator tells another something relevant to the conspiracy does not alone make the declaration competent; the declaration must itself be an act in furtherance of the common object; mere conversation between conspirators is not that, any more than the declaration of an agent outside the scope of his duties."

Out of this entire conversation, which occupies 17 pages of the transcript, the Appellate Court has only been able

to cull two statements which it claims were in furtherance of the object of the conspiracy, to-wit: the extremes to which Steffen would go to dispose of an informer and Benevedes' threat to kill Marie Basom if she carried information to the officers. Neither of these statements can be deemed acts in furtherance of the conspiracy. Certainly Benevedes' opinion as to what Steffen would do in the future cannot be construed as such an act and Benevedes' statement that he would kill Marie Basom under certain circumstances was a mere expression of intention on his part not carried into effect by any overt act. The correct rule in this regard is declared as follows:

> "Declarations showing past acts, or expressing merely the opinion or desire of the conspirator making them, are not binding upon anyone except himself, or those in whose presence they are made. (*Spies v. People,* 122 Ill. 1, 3 Am. Rep. 321; *Samples v. People,* 122 Ill. 547; 1 Greenl. 1, Ev., sec. 111, 233, * * *)
>
> *People v. Irwin,* 77 Cal. 494, 504, 20 Pac. 56."

Actually, the lower Court in a prior opinion, *Romeo v. United States,* 23 Fed. (2d) 551, 553, upheld the inadmissibility of such expressions of future intention. The Court's language is as follows:

> "The major part of the testimony of Agent Whitney related to reports made to him from time to time by the defendant Rossi, giving information as to the personnel of the conspiracy and narrating what they had done in the past and **what they proposed to do in the future, such as when a certain cache would be filled, and where the cache could be found.** Rossi was not on trial, and it will be conceded, perhaps, that statements made by him were

> incompetent as against the other defendants, unless made in their presence, or unless made in furtherance of the object of the conspiracy. It is not contended that the statements were made in the presence of any of the other defendants, nor can it be successfully contended that they were made in furtherance of the object of the conspiracy."

The lower Court likewise adopted the same rule in *Mayola v. United States,* 71 Fed. (2d) 65 and the Court of Appeals for the Second Circuit in *United States v. Goodman,* 129 Fed. (2d) 1009 likewise reversed for the admission of a narrative statement of past events which contained expressions of future intention.

Lastly, the lower Court holds that because the wire recording was full of filth and obscenity, the reading thereof could result in no prejudice to defendant, even though it was disgusting and revolting to the jury, because the jury by observation would know that Zamloch was incapable of the use of such disgusting language, etc. (P. 2172.) This is not consistent with the language of this Court in *Krulewitch v. United States, supra,* at p. 454, where it is said:

> "It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together."

Even if we should assume for purposes of argument that the two statements attributed to Benevedes were acts or statements in furtherance of the object of the conspiracy, this did not render the entire conversation admissible in evidence.

Where a mass of matter is offered in evidence against a defendant, ninety per cent or more of which is incompetent and prejudicial, the fact that a very small portion thereof is competent and admissible does not justify its admission where a specific objection is made to the entire mass of offered matter. Here, defendant objected to the wire recording on the ground that it was narrative and not in furtherance of the conspiracy. (R. 1094.)

In *Harrison v. United States* (6 Cir.) 200 Fed. 662, 674, the Government offered and there was received in evidence a letter containing incompetent statements prejudicial to defendant. There was a portion of it that was admissible. The Court reversed the conviction stating as follows:

> "While we may concede that the letter was not wholly immaterial upon the subject of intent, it was, at the best, remote in point of time, and of uncertain effect in this respect. Whatever materiality it might have is subordinate to, and merged in, its more generally objectionable and injurious character as evidence; the minor, rightful bearing on intent would necessarily be inseparable from the major wrongful effect of the recited decision; and the limitations made and instructions given by the court as to the force which could be permitted to this letter could not, we think, operate to prevent serious harm flowing from its reception to respondent's rightful interests."

In the cases of *Huntington v. United States* (8 Cir.) 175 Fed. 950, 951 and *England v. United Stctes* (5 Cir.) 174 Fed. (2d) 466, 469, the Courts held that where a

mass of matter is offered, part of which is admissible and part incompetent and inadmissible, it is not the duty of the trial Judge to segregate the good from the bad, but the burden is on the person offering the evidence to point out the admissible parts and that a rejection of the entire offered evidence under such circumstances is proper. Strangely, this rule had once been followed by the Court for the Ninth Circuit in the case of *Lane v. United States*, 142 Fed. (2d) 249, 253.

The prejudicial effect of the admission of this conversation cannot be over emphasized. It was used by the Government to corroborate the testimony of Hugh Basom (who did not personally testify to this conversation), to bring before the jury the testimony of Paul Steffen, who was not called as a witness, and the testimony of Benevedes who was not called as a witness, and was used as proof of the dealings between Zamloch, Steffen and Benevedes relative to the alleged bribing of Marie Basom and Zamloch's participation therein. As illustrative of these matters, we quote from the prosecutors' arguments to the jury:

> "We certainly welcome the closest scrutiny of our witnesses. And in that scrutiny we ask that **you bear in mind that the recording is confirmatory of the testimony of the Government's witnesses.** The recording, ladies and gentlemen of the jury—**the recording of the voice of Albert Benevedes, * * * The recording shows that the voice of Albert Benevedes characterized the defendant as a hustler and said that this defendant had told Paul Steffen,** the big shot, in so many words, at the time that Paul Steffen gave Archer Zamloch $4,500, in so many words, ac-

cording to Albert Benevedes, who claims he was present—Paul Steffen said, or Archer Zamloch said to Paul Steffen, 'If I knew who you were at first, $5,000 would not have been too much.' And he said that Steffen threw the money at Archer Zamloch." (R. 1989.)

"**But according to the recording,** Mr. Zamloch was not willing to be counted out when it came to the delivery of the $4,000 to Marie Basom. **According to the recording,** he already having secured $500 from Paul Steffen for the safekeeping of the $4,000, Archer Zamloch goes to the defendant on the brink of her departure for Alderson and tells her it will be another 10%. Despite the fact that the girl was convicted, despite the fact that she faced three years, he was still willing to take what Mr. Benevedes described as part of the loot." (R. 1993.)

"**That record** (the recording) **was necessary and it corroborated everything that Basom had told the authorities.** He says Basom was the only one who was the violent man. **Read the record. Take the transcript into the room,** and remember when Basom was saying, 'That girl wants $5,000, we need $5,000,' that was a suggestion, too." (R. 2073.)

"**What did Steffen say?** $500 for holding the $4,000? Steffen, the gangster, the big-shot, the man who gave $15,000 mortgages and promissory notes, and $10,000 mortgages, he threw up in the face of Mr. Zamloch everything that Basom has said, **everything that Marie Basom has said has been corroborated in this recording** made by Benevedes when he knew that no one was listening to him. **Get around the recording if you can.** And the answer is, ladies and gentlemen of the Jury, **you can't get around that recording.**" (R. 2074.)

The rules of evidence relative to conspiracy cases have already been stretched to the breaking point. (See, concurring opinion of Mr. Justice Jackson in *Krulewitch* v. *United States*, *supra*.) The decision of the Court of Appeals herein attempts to further broaden the scope of proof against a defendant charged with such crime. Such unwarranted extension of the rules should not be sanctioned by this Court.

II. THE COURT ERRED IN INSTRUCTING THE JURY AS TO THE EVIDENTIARY VALUE OF THE WIRE RECORDING.

The Court instructed the jury as to the wire recording as follows:

> "The Government further relies upon statements in what is known as the wire recording. Statements by co-conspirators are not allowable unless and until a jury finds that there was a conspiracy, and the parties who made the statements and the parties charged in the trial were in that conspiracy. In other words, if it is charged that A, B, and C entered into a conspiracy and did certain things in violation of the law, if A just comes out and says B and C were in it, that is not allowable and that is not evidence, until the jury is convinced by other evidence that A, B and C were in the conspiracy and had agreed to do these unlawful acts, and if the jury reached such a conclusion that A, B and C have entered into that conspiracy and were conspiring and confederating together and acting together to violate the law, then the statements made by A to B and C, or to either of the others, those declarations of what is known as the co-conspirator during the existence of the conspiracy, are good and valuable evidence against all

of the conspirators that the jury has found were members of that conspiracy.

If the jury concludes that at the time of the wire recording in the apartment on Market Street, when Hugh Basom and Albert Benevedes met and had a conversation, which was recorded and excerpts of which had been read to you—if the jury concludes that Archer Zamloch and Hugh Basom and Benevedes and any others had entered into a conspiracy and that Benevedes and Zamloch, at that time, were still in that conspiracy and still agreeing and violating the laws of the United States, then those statements that Benevedes made are evidence against himself and against Zamloch, and are to be considered by this jury—if you believe them." (Vol. V, pp. 2104-5.)

Appellant took exception to the foregoing portion of the charge. (Vol. V, p. 2117.)

The foregoing was the *only* instruction given by the Court on hearsay statements of alleged co-conspirators.

The instruction was erroneous for the following reasons:

(a) The wire recording should never have been admitted in evidence and therefore no such instruction should have been given.

(b) The instruction failed to distinguish between such hearsay statements of a co-conspirator made to further the object of the conspiracy and statements which were mere narratives of past events.

The Court of Appeals upheld the giving of this instruction for the following reasons:

(a) That the admissibility of the wire recording was a question of law for the Court and as it ruled that such evidence was admissible, the jury then had a right to consider it with all the evidence in the case;

(b) That the conversation contained statements in furtherance of the conspiracy had been determined by the Court and that function was thus withdrawn from the jury, and

(c) That no request was made by appellant to have included in the instruction the matter now urged as essential. (The distinction between narrative statements and those in furtherance of the conspiracy. (R. 2172.))

Each of the reasons of the lower Court is erroneous. The mere fact that the Court ruled the evidence admissible did not take away from the jury the right to determine the nature of the conversation and whether it was in furtherance of the conspiracy, or not.

It was the duty of the trial Court to correctly charge on all questions of law involved and the failure to charge on a basic issue in the case constitutes reversible error.

In *Bollenbach v. United States*, 326 U.S. 607, 90 L. ed. 318, this Court has laid down the rule that:

> "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria."

and later states:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

As pointed out in the argument under the preceding heading, the wire recording was most prejudicial and contained voluminous narrative statements of past events involving Zamloch with the receipt of money for bribing Marie Basom, hearsay statements of Steffen and Benevedes, etc. The failure to instruct the jury that such narrative statements of past events could not be considered against Zamloch and the instruction that all such statements were proper evidence against Zamloch not only permitted but authorized the jury to consider this incompetent evidence for the purpose of basing the conviction thereon.

III. THE COURT OF APPEALS ERRED IN SUSTAINING THE ADMISSION IN EVIDENCE OF THE TESTIMONY OF HUGH BASOM RELATING TO A CONVERSATION BETWEEN BASOM AND BENEVEDES IN AUGUST OF 1949.

During the direct examination of Hugh E. Basom, a witness for the Government, it was developed that in August of 1949 Basom went to the apartment of Albert Benevedes and had a conversation with Benevedes and Benevedes' wife. When asked to relate the conversation, appellant objected on the ground that it called for a narrative of past events. (Vol. II, p. 877.) The Court overruled the objection on the ground that the charge was a continuous conspiracy down to the date of the indictment and any acts or statements made during the period were competent. (R. 877.) Whereupon the witness gave the following testimony:

> "A. No, I did not. Benevedes jumped up and said, 'Now, you sit down. I've got something to tell

you.' He said, 'Did you know that girl wanted to call the prosecuting attorney, wanted to turn the whole bunch of us in?'

I said, 'No, I did not.'

He said, 'Well, she did. Zamloch came to me and told me, or called me—I don't know which it was—that she wanted to go to the authorities, and I immediately got hold of Steffen. We went to Steffen's office and made an agreement with Zamloch to pay him $500 to go down there and tell her to keep her mouth shut.' He said, Marie went down—or Zamloch went down and Marie agreed to keep quiet for $4,000." (R. 879.)

On our argument as to the inadmissibility of the wire recording we have set forth all the authorities relative to the prejudicial error in admitting statements of alleged conspirators which were merely narrative of past events. The reading of the foregoing testimony of Basom shows that it is of this character of incompetent testimony. It was most damaging. It is the only evidence (other than the wire recording) in the case dealing with the fact that Zamloch and Benevedes had gone to Steffen's office and that Zamloch had received $500 in order to persuade Marie Basom to keep her mouth shut or that Marie Basom had agreed to keep her mouth shut for $4000.

The Court of Appeals upheld the introduction of the foregoing testimony on the following grounds (R. 2174):

"This proffered evidence was objected to on the ground that it called for a narrative of past events. The conversation was an attempt on the part of Benevedes to bring Hugh Basom, a co-conspirator, down to date on the effectiveness of the conspiracy. He, Hugh Basom, had been absent for some time at

sea. Benevedes knew Hugh had influence with Marie Basom. She was threatening to get out of hand. He was requested to see Zamloch who informed him of the $4,000 which had been paid to purchase Marie's silence and arrangements were made for its disposition. There is no question in our minds but that the conversations had were for the purpose of insuring the continuance of the conspiracy to induce Marie Basom to remain silent. It was designed to move a co-conspirator, absent for some time, to resume active cooperation as such."

The foregoing constitutes violent assumptions on the part of the lower Court. If it was an attempt to advise Basom of all that had happened in his absence this was a mere narrative of past events and inadmissible.

The Court's statement that Marie was threatening to get out of hand referred to her activities prior to her trial. While the Court of Appeals may have entertained no question that the conversation was for the purpose of insuring the continuance of the conspiracy to induce Marie Basom to remain silent, there is no evidence in the record as to such fact. The statement that the conversation was designed to cause Hugh Basom to resume active cooperation as a co-conspirator likewise is without foundation in the record and, under the authorities we have above cited, is not an act to further the object of the conspiracy charged. We know of no rule or case holding that an attempt to keep a conspirator within the conspiracy is an act to further the object of the conspiracy. Furthermore, Basom was not ostensibly leaving any conspiracy. The fabricated tale he told Benevedes refutes any such assumption. Nothing in the conversation indicated to Bene-

vedes that he should attempt to move Basom to resume activities; in fact Benevedes refused to comply with Basom's suggestions.

IV. THE COURT OF APPEALS ERRED IN UPHOLDING THE ADMISSION IN EVIDENCE OF THE MORTGAGE FROM STEFFEN TO MacINNIS.

On May 19, 1950 Paul Steffen and his wife executed a mortgage for $15,000 to James Martin MacInnis. The facts surrounding this mortgage have been set forth in the statement of the case.

At the conclusion of the Government's case in chief it offered this mortgage in evidence without any preliminary foundation having been laid or without any evidence having been offered relative thereto. Appellant at that time objected on the ground it was hearsay not binding on defendant Zamloch and not based upon any foundation. (Vol. III, p. 1148.) The Court denied the admission of the mortgage in evidence stating that it was "not willing to adopt the method either of communism or fascism of guilty by association" (p. 1148) and that it was not a document relating to Zamloch.

During the cross-examination of defendant Zamloch he denied all knowledge thereof or any arrangement made with Steffen at or before the time of the execution of the mortgage. The Government again offered the mortgage in evidence and it was again excluded by the Court. (Vol. III, p. 1355.) Later on, during the cross-examination of Zamloch, in support of the admissibility of the mortgage in evidence, the Assistant United States Attorney stated to the Court as follows:

"Mr. Karesh. No, the motive for this whole obstruction of justice, not alone to get $500, not alone to get $2,000, but the motive was to get a lucrative client like Mr. Paul Steffen, who would come in and pay them $15,000." (Vol. IV, p. 1537.)

Three pages prior to the above statement (p. 1534) appellant objected to the introduction of the mortgage in evidence on the ground that the mere fact there was a partnership or association of Hallinan, MacInnis and Zamloch did not make the mortgage admissible.

There had been developed the method of Mr. Hallinan, Mr. MacInnis and Mr. Zamloch conducting their law business, how fees were divided, etc., and out of a clear sky and a hundred pages later the Court admitted the mortgage in evidence stating as follows:

"There are, however, some very important matters, and today, in view of the evidence that has been brought out of the transactions in this law firm or association or group, or whatever it may be called; of its formation or lack of formation, (1545) and of its alleged dissolutions; of the associates, the employes, connections or affiliations that it has; of the fact that this witness says that in November, 1949, he was informed that Steffen, and probably Benevedes, was putting up or had put up $4500, of which he was getting $900, and of which later in the Spring he sent $3600 to Marie Basom—in view of all of that, I think that evidence relative to the existence of a mortgage alleged to secure the sum of $1500 to Mr. James MacInnis, his partner or associate, affiliate, or companion of the defendant, now becomes pertinent, and I think I should say that I will revoke my ruling, allow the mortgage in evidence, and it should go in at this time so the defendant will have full notice thereof.

Mr. Karesh. It is $15,000, your Honor; you said $1500.

The Court. If I said $1500, it was a mistake; $15,000 certainly." (Vol. IV, p. 1639.)[11]

The mortgage was executed in May of 1950, many months after Marie Basom had been convicted. The mortgage had nothing to do with the charges contained in the indictment and certainly was not part of any alleged conspiracy or bribery or subornation of perjury occurring prior to July, 1949.

Nowhere in the record is there any evidence that appellant knew aught of the execution of the mortgage and he expressly denied all knowledge thereof under oath at his trial (pp. 1351-2). James Martin MacInnis, appellant's attorney, likewise denied knowledge of this mortgage but whether he did or did not have such knowledge becomes wholly immaterial under the authorities hereinafter cited. Richard Siegel who drew the mortgage, gives no testimony that either MacInnis, Zamloch or Hallinan had any knowledge of the drafting and execution of the mortgage or had participated in negotiations leading thereto.

The act of a partner cannot be attributed to the other partner in a criminal case, unless the partner who is sought to be charged with such act, **had knowledge thereof and participated therein.** Such is the law as announced in the following cases:

United States v. Ward (3d Cir.), 168 Fed. (2d) 226, 228;

[11] We quote the language of the Court as the jury, after it retired to deliberate on its verdict, came back into Court and asked that there be read to it the foregoing remarks.

Sleight v. United States (C.A. D.C.), 82 Fed. (2d) 459, 461;

United States v. Wilson (D.C.), 59 Fed. (2d) 97, 98.

On pages 1163 and 1167 of the record, the Assistant United States Attorney in urging the admission of the mortgage states that even though Zamloch had no dealings with Steffen in 1950, the fact that there was the law firm of Hallinan, MacInnis and Zamloch connected Zamloch with the mortgage and with Steffen.

The prejudicial effect of this mortgage was tremendous. It was used throughout the opening and closing arguments of the prosecution. In his opening argument, Prosecutor O'Gara states that the very purpose of the conspiracy was "above all else, to keep for that firm the client Paul Steffen". (p. 1977.)

Again on page 1991 Mr. O'Gara argues as follows:

> "Can we believe, ladies and gentlemen of the jury, that on May 9, a $15,000 mortgage to Mr. MacInnis and a $10,000 mortgage to Mr. Siegel, a man employed by Archer Zamloch, came into that office without previous contact with the office? Doesn't it suggest, ladies and gentlemen, that Paul Steffen, as the recording shows, commenced his connection with this office at the commencement of the Marie Basom case on April 16, 1949?"

Assistant United States Attorney Karesh in his closing argument to the jury argued as follows:

> "We are going to ask ourselves this question: Why would Mr. Zamloch risk everything—his future, his career? Why? What was the motive? Mr. O'Gara has stated it. Not the $2,000 that Benevedes, he

finally admitted, gave to him, and for which there was never a record, not the $500 that he got from Steffen, but a lucrative client for the firm, because the firm, you see, share all the money. He was a lucrative client for the firm. Now you say to yourself, 'Why all the prodding and the probing of the prosecution with relation to presenting of the status of the firm?' I think you will see it. In our case in chief we have made an offer of this mortgage of $15,000 as evidence on behalf of the United States. We had shown it to counsel. At that time there had been no foundation laid in the case in chief for the admission of this document. Now, this is a deadly document because it shows, as I say, the profit motive, $15,000." (p. 2062.)

That the jury was greatly impressed with the arguments of the prosecutors, the use made of the mortgage and that it was damaging evidence against appellant is demonstrated by the following facts. The jury retired to deliberate on its verdict at 11:27 A.M. (p. 2115.) At 9:20 P.M. the jury was brought back into the Courtroom whereupon the following proceedings were had (Vol. V, p. 2127):

"**The Court.** Ladies and gentlemen, I understand you desire to have some further information. May I help you?

The Foreman. Your Honor, the jury would like to have read again your remarks when you admitted the $15,000 mortgage and assignment of the mortgage into testimony."

Thereupon the Court read to the jury its remarks, printed above, which it had made at the time it admitted

the mortgage in evidence. Thirty-five minutes later, at 9:55 P.M., the jury returned its verdicts of guilty. (R. 2133-4.)

The Court of Appeals upheld the admission of the mortgage on the ground that the matter of admission rested in the discretion of the trial Court and that no prejudice resulted to appellant from its admission (R. 2174), and at p. 2173 states as follows:

> "The theory upon which the mortgage was admitted, insofar as we are able to determine from the remarks of the trial court, was that the mortgage was relevant to the extent that it shed some light upon the relations of Zamloch, as a member of a law firm, and its (the firm's) relations with their client Steffen. The evidence then before the trial court seems to have convinced it that Zamloch could reasonably be charged with knowledge of the execution of the mortgage. The size of the mortgage was evidence of how valuable the client Steffen was to the firm. Zamloch undoubtedly would be anxious that the firm secure a client able to pay such a large fee. Hence, with that thought in mind, he would have been all the more willing to further the conspiracy to protect Steffen. The $2000 fee for defending Marie Basom he had earned. A motive must have existed for Zamloch to enter into the hazardous business of obstructing justice. The gaining and retention of a client capable of paying large fees could have been the inducement. The mortgage was relevant in this respect."

The premise on which the trial Court admitted the mortgage and the theory of the prosecution, both of which were adopted by the Court of Appeals, are erroneous.

If there was any motive on the part of Zamloch to procure a future lucrative client for himself or for the law firm with which he was identified, such motive could have been readily realized in 1949 by having Marie Basom tell of the involvement of Benevedes, Hugh Basom and Steffen. There is no evidence in the record that in 1949 Zamloch knew Steffen or that he was wealthy, would be a lucrative client, or that by any possibility he would have any future legal business to bring to Zamloch. Zamloch denied knowing or knowing of Steffen until 1950.

V. THE COURT OF APPEALS ERRED IN SUSTAINING THE ADMISSION IN EVIDENCE OF THE MORTGAGE FROM STEFFEN TO RICHARD M. SIEGEL.

During the cross-examination of appellant Zamloch, the trial Court admitted in evidence a mortgage dated May 19, 1950 wherein Paul Steffen and his wife were the mortgagors and Richard M. Siegel, the mortgagee, for $10,000. (R. 1685.) Appellant objected to the introduction of this mortgage on the ground that while it was damaging enough to charge Mr. Zamloch with the conduct of James Martin MacInnis, that to charge him with the conduct of Mr. Siegel added an inference to an inference to a speculation. The Court admitted the mortgage stating: "You have an associate of an associate of an associate here." (R. 1685.)

As pointed out in the statement of the case, this mortgage was executed at the same time as the one by the Steffens to James MacInnis. It was error to admit this mortgage in evidence for all the reasons heretofore stated

as to the error in admitting the Steffens-MacInnis mortgage.

The Court of Appeals (R. 2174) sustained the admission of this evidence on the following grounds:

> "What we have said in relation to the admission of the mortgage from Steffen to MacInnis has equal application here. Again, the district court concluded that Siegel's connection with the firm was such as to bring notice of this mortgage to Zamloch. This evidence would have value and relevancy as shedding light upon Zamloch's motive in entering the conspiracy, an additional circumstance indicating that Steffen was the sort of client worth going to great lengths to protect."

Siegel was not a member of the law firm of Hallinan, MacInnis and Zamloch. He was an independent practitioner who had offices in the same building with the named law firm (R. 1799-1800) and did some work from time to time for said firm; that Steffen employed him personally to handle his tax matters (R. 1801).

There is no such thing as imputed knowledge in a criminal case. Yet, according to the lower Court, the mere fact that Siegel had offices in the same building with the law firm of which Zamloch was a member and did work for that firm, was sufficient to bring notice of this mortgage to Zamloch. The Court further held that a mortgage from Steffen to Siegel, in which Zamloch had no interest and possessed no knowledge of its execution, shed some light on Zamloch's motive in entering the conspiracy a year before the mortgage was executed, despite the fact that the mortgage was executed a year after the

formation of the alleged conspiracy, and despite the fact that Zamloch had no knowledge thereof.

VI. THE COURT OF APPEALS IS IN ERROR IN HOLDING THAT THE ERRORS AT THE TRIAL WERE CURED BY THE PROVISIONS OF RULE 52a OF THE RULES OF CRIMINAL PROCEDURE AND THAT ANY CLAIMED ERROR DID NOT AFFECT THE SUBSTANTIAL RIGHTS OF APPELLANTS. (R. 878.)

As demonstrated in the foregoing arguments, the admission of the wire recording, the Court's instruction thereon, the admission of the mortgages and the corrective statement made by Benevedes to Hugh Bacon as testified to by Hugh Bacon, all affected the substantial rights of the defendant and were most prejudicial. Without such testimony the jury would have been left to choose between the stories by Marie and Hugh Bacon and the testimony of Arthur Zamloch. With the admission of such evidence, the prosecution witnesses' stories were greatly magnified and corroborated.

In *Kotteakos v. United States*, 328 U.S. 750, 90 L. ed. 1557, this Court has stated that it is not an Appellate Court's function to determine guilt or innocence. Such function is for the jury under proper judicial guidance and in conformity with appropriate procedure and standards for trial in the Federal Courts. To the same effect is the case of *Bollenbach v. United States*, 326 U.S. 607.

In *Williams v. Great Southern L. Co.*, 277 U.S. 19, 36, 72 L. ed. 763, this Court held that the admission or exclusion of evidence which affects the substantial rights

of a defendant on trial necessitates a reversal and that such action is not saved by the Harmless Error Statute or Rule.

In every case that we have cited—dealing with the incompetency of hearsay testimony of a co-conspirator narrating past events—down to the case of *Krulewitch v. United States*, *supra*, **the Courts have held the admission of such evidence to be an act affecting the substantial rights of a defendant and have reversed accordingly.**

CONCLUSION

All of the foregoing errors permeated the entire trial, both as to the conspiracy charged and the substantive offense of bribery. No distinction was made in the admission of evidence or in the Court's charge to the jury segregating any of the foregoing evidence from either one of the offenses charged. Without the admission of this incompetent evidence the jury may well have come to a different conclusion by believing the testimony of Mr. Ennisch and disbelieving the testimony of such characters as Hugh and Marie Bacon. With the admission of this evidence and the way it was used by the prosecution—the wire recording, the conversation between Bacon and Benevedes in August of 1949 and the mortgage—the case for the prosecution became tremendously strong; as said in *Fiswick v. United States*, 329 U.S. 211, 220:

> "And the charge that each petitioner conspired with the others became appreciably stronger, not from

what he said but from what the other two said. We therefore cannot say with any confidence that the error in admitting each of these statements against the other petitioners did not influence the jury or had only a slight effect. Indeed, the admissions may well have been crucial."

Here the case against petitioner became appreciably stronger not from anything that petitioner said, but from what is alleged to have been said by Steffen and Benevedes, neither of whom were called as witnesses at the trial.

Dated, San Francisco, California,
March 5, 1952.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Petitioner.